



State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES

6 Hazen Drive, P.O. Box 95, Concord, NH 03302-0095

(603) 271-3503 FAX (603) 271-2867



PLEASE NOTE: Effective September 1, 2003, the street address is 29 Hazen Drive.  
December 12, 2003

Wayne Thistle  
44 Cross Brook Road  
Loudon, NH 03307

Re: Docket No. AF 03-035 - Administrative Fine by Consent Agreement

Dear Mr. Thistle:

Enclosed for your records is a copy of the Administrative Fine by Consent Agreement in this matter executed by Harry T. Stewart, P.E., Water Division Director, and accepted by Commissioner Michael P. Nolin on December 12, 2003. On behalf of the Department of Environmental Services, thank you for your cooperation in resolving this matter.

Sincerely,



Michael Scialfani,  
Legal Assistant

cc: Harry T. Stewart, P.E., Director, Water Division  
Gretchen Rule, DES Legal Unit  
Susan Weiss Alexant, Hearings and Rules Attorney  
Mark R. Harbaugh, DES Legal Unit  
Jennifer J. Patterson, NH DOJ  
Mary Ann Tilton, DES WET  
DES Public Information Officer



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Wayne Thistle  
44 Cross Brook Road  
Loudon, NH 03307

Re: DES Wetlands File No. 01-2480  
DES Site Specific File WPS-6194

ADMINISTRATIVE FINE  
BY CONSENT  
No. AF 03-35

## I. INTRODUCTION

This Administrative Fine by Consent is entered into by and between the Department of Environmental Services, Water Division and Wayne Thistle, pursuant to RSA 482-A:13. This Administrative Fine by Consent is effective upon signature by all parties.

## II. PARTIES

1. The Department of Environmental Services, Water Division ("DES"), is a duly constituted administrative agency of the State of New Hampshire, having its main office at 29 Hazen Drive, Concord, NH 03302-0095.
2. Wayne Thistle is an individual having a mailing address of 44 Cross Brook Road, Loudon, NH 03307.

## III. BACKGROUND

1. Pursuant to RSA 482-A, the DES regulates dredging, filling, and construction in or on any bank, flat, marsh, wetland, or swamp in and adjacent to any waters of the state. Pursuant to RSA 482-A:11,I, the Commissioner of DES has adopted Wetland Rules Wt 100 *et seq.* to implement this program.
2. Pursuant to RSA 482-A:13, the Commissioner is authorized to impose administrative fines of up to \$2,000 per offense for violations of the statute, of rules adopted pursuant to the statute, or of any order or permit issued under that statute. Pursuant to RSA 482-A:11,I, the Commissioner has adopted Env-C 614 to establish the schedule of fines for such violations.
3. RSA 482-A:3, I states that "no person shall excavate, remove, fill, dredge or construct any structures in or on any bank, flat, marsh, or swamp in and adjacent to any waters of the state without a permit from [DES]."
4. RSA 482-A:14, III provides that "failure, neglect or refusal to comply with [RSA 482-A] or rules adopted under [that] chapter, or an order or condition of a permit issued under [RSA 482-A], and the misrepresentation by any person of a material fact made in connection with any activities regulated or prohibited by [RSA 482-A] shall be deemed violations of RSA 482-A."

5. Pursuant to RSA 485-A:17, DES regulates significant alteration of terrain and erosion control through a permit program. Pursuant to RSA 485-A:6, VIII, DES has adopted NH Administrative Rules Env-Ws 415 to implement this program.

6. Pursuant to RSA 485-A:22, V, the Commissioner is authorized to impose fines of up to \$2,000 per violation for violations of *inter alia*, RSA 485-A:17, Env-Ws 415, or any permit issued pursuant thereto. Pursuant to RSA 485-A:22, V, the Commissioner has adopted Env-C 603 to establish the schedule of fines for such violations.

7. Wayne Thistle is the owner of the real property located at Cross Brook Road, Loudon, NH, more specifically referenced on the Loudon Town Tax Map as Lots 10 and 12 ("the Property").

8. On October 29, 2001, DES personnel inspected the Property. During the inspection, DES personnel observed that a section of the extension to Cross Brook Road was constructed, but the road was not extended across Bee Hole Brook. (A wetlands permit application for the extension of Cross Brook Road was being reviewed by DES at this time). DES personnel also observed that slopes leading down to Bee Hole Brook were not stabilized and siltation fence was installed too close to the channel of Bee Hole Brook to protect adjacent wetlands. DES personnel requested that Mr. Thistle pull back the silt fences to the toe of slope, stabilize the slope down to Bee Hole Brook with seed and mulch, and submit photographs documenting compliance with these requests. Mr. Thistle did not comply with these requests.

9. On April 19, 2002, DES issued Wetlands and Non-Site Specific Permit No. 2001-02480 ("the Wetlands Permit") to Wayne Thistle for the extension of Cross Brook Road (Wt. File # 2000-0078). The Wetlands Permit authorized one 120 ft. long perennial stream crossing including the installation of a three-sided steel plate pipe arch, and one 77 ft. long intermittent stream crossing, and the fill of 7,210 sq.ft. of palustrine and riverine wetland systems, to provide access to a proposed 16-lot subdivision on 200.12 acres (the "Project").

10. Condition 1 of the Wetlands Permit required that "all work shall be done in accordance with plans by Brown Engineering dated September 1, 2001, as received by the Department on April 8, 2002" (the "Plans"). The Plans detail the construction sequence and the measures for erosion and sediment control. Relevant provisions of the Plans include:

- a. Item 1 of the Erosion Control Notes required that the "installation of hay bale barriers and siltation fences shall be completed prior to the start of site work in any given area. Prefabricated siltation fences shall be installed according to the manufacturer's recommendations."
- b. Item 2 of the Erosion Control Notes required that "haybale barriers and siltation fences shall be kept clean during construction and removed when all slopes have a healthy stand of vegetative cover. Erosion control measures shall be inspected on a weekly basis and after every rainfall."
- c. Item 2 of the Construction Sequence required the construction of temporary and permanent erosion control facilities prior to any earth moving operation.

- d. Item 3 of the Construction Sequence required that "all stockpiles shall be seeded with winter rye and if necessary surrounded with hay bales in order to prevent loss by erosion."
- e. Item 4 of the Construction Sequence required all slopes to be stabilized immediately after grading.

11. Condition 5 of the Wetlands Permit required that "the Permit shall not be effective until it has been recorded with the Registry of Deeds Office by the Permittee. A copy of the registered permit shall be submitted to the DES Wetlands Bureau."

12. Condition 6 of the Wetlands Permit required that appropriate siltation/erosion/turbidity controls be in place prior to construction, maintained during construction, and remain until the area is stabilized.

13. Condition 7 of the Wetlands Permit required that orange construction fencing be placed at the limits of construction adjacent to wetlands to prevent accidental encroachment on wetlands.

14. Condition 15 of the Wetlands Permit required that the contractor responsible for completion of the work to utilize techniques described in the DES *Best Management Practices for Urban Stormwater Runoff Manual* (January, 1996) and the *Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas in New Hampshire* (August, 1992).

15. On May 31, 2002, DES issued Site Specific Permit No. WPS-6194 (the "Site Specific Permit") to Mr. Thistle for the Project.

16. Item 1 of the Site Specific Permit required that "water quality degradation shall not occur as a result of the project."

17. Item 2 of the Site Specific Permit required that "revised plans shall be submitted for permit amendment prior to any changes in construction details or sequences. The Department must be notified in writing within ten days of a change in ownership."

18. On September 4, 2002, DES personnel inspected the Property and observed the following:

- a. Silt fencing was not maintained along the edge of wetlands. Silt fence had not been installed at the toe of slopes adjacent to the banks of Bee Hole Brook and at wetland crossing #3 as required by the Plans;
- b. Exposed slopes were not stabilized;
- c. Failure to install erosion controls had caused sediment (fill) to be deposited in Bee Hole Brook. Additionally, at wetland crossing #3, a culvert pipe was not installed in accordance with the Plans and erosion controls were not installed to protect adjacent wetlands. As a result, sediment laden runoff was pooling in and adjacent to wetlands;

- d. Soil material was stockpiled adjacent to wetlands. Temporary erosion controls such as hay bales or silt fence were not in place around the base of stockpiles, nor were stockpiles seeded with winter rye to prevent loss by erosion;
- e. Orange construction fencing was not installed to prevent encroachment onto wetlands; and
- f. The construction area for the extension of Cross Brook Road had been cleared and grubbed, construction of the road extension was on-going, the house at lot 14 was being constructed, and slopes adjacent to the road were graded.

19. During the inspection, DES personnel collected turbidity samples in Bee Hole Brook. A background sample measuring 8.2 Nephelometric Turbidity Units ("NTUs") was taken 100 ft. east (upstream) of the culvert, a second sample taken at the east (upstream end) of the culvert measured 75 NTUs, and a third, taken 10 ft. west of the downstream end of the culvert measured 37 NTUs.

20. DES personnel met with Mr. Thistle during the September 4, 2002 inspection. At the meeting, DES personnel stressed the importance of stabilizing the site as soon as possible to prevent further erosion of sediments into jurisdictional wetlands and Bee Hole Brook. At the September 4, 2002 inspection, DES personnel offered the following recommendations:

- a. Tack, mulch, and seed exposed slopes and stockpiles. Surround stockpiles with temporary erosion control measures to prevent further erosion;
- b. Install hay bales, trench in siltation fences, and repair or install remaining erosion controls as required by the Construction Sequence and Erosion Control Notes on sheet C-10 of the Plans;
- c. Install water bars and check dams where necessary to prevent channelized flow of sediments off the roadway into wetland areas;
- d. Install orange construction fencing at the limits of construction to prevent accidental encroachment into wetlands; and
- e. Retain a qualified wetland scientist to supervise the execution of items a.-d., and to design a restoration plan for removal of sediment in Bee Hole Brook.

21. On September 5, 2002, DES personnel faxed a typed copy of these observations and recommendations to Mr. Thistle.

22. On September 9, 2002, DES personnel contacted the Merrimack County Registry of Deeds. The Registry of Deeds informed DES personnel that the Wetlands Permit (2001-02480) was not recorded.

23. On September 10, 2002, DES personnel conducted a follow-up inspection of the Property and observed the following:

- a. Slopes were not stabilized above culvert headwalls, on either side of the culvert headwalls, or in back of lot 14 adjacent to the east bank of Bee Hole Brook, as requested during the September 4, 2002, inspection. Mulch was being applied to some of the slopes during the inspection;
- b. Silt fences were neither installed along culvert headwalls, located at the toe of the steep, unstable slopes, nor at the toe of slopes near the start of construction of Cross Brook Road. Silt fence had been installed and backed with hay bales at the toe of slopes on either side of the culvert at Bee Hole Brook;
- c. Stockpiles were neither ringed with silt fence, hay bales, or any other temporary erosion controls, nor stabilized with vegetation;
- d. Rip-rap swales to the west of Bee Hole Brook were constructed but check dams along the swales were constructed of stone that was too large to significantly slow flow and allow sediment to filter out. Level spreader #1 was not constructed as specified in the Plans. Mr. Thistle said that level spreader #1, located downstream of the culvert and adjacent to the westerly bank of Bee Hole Brook, could not be constructed without removing additional trees, which he thought might cause bank erosion because of the channelized water flowing down the rip-rap swale. Rip-rap swales to the east of Bee Hole Brook were not constructed;
- e. Orange construction fencing was not installed at the limits of construction adjacent to wetlands;
- f. Wetland crossing #3 was not constructed in accordance with the Plans. A channel had been excavated alongside the permitted 18" culvert crossing the roadway. The channel was completely exposed, no erosion controls were installed and the channel had filled with sediment laden water. Hay bales and silt fence had been installed at either end of the culvert. There was evidence of sediment outside the silt fence. The rip-rap apron, designated in the Plans, was not constructed;
- g. Mr. Thistle told DES personnel that he had contacted Peter Schauer, C.W.S. from Schauer Environmental Consultants, L.L.C., to assist with the restoration, but Mr. Schauer had not yet been on site; and
- h. DES personnel measured 1,362 linear feet of sediment 1.5-8 inches deep in Bee Hole Brook (forty-seven linear ft. upstream of the culvert, 95 linear ft. in the culvert, 1,220 linear ft. downstream of the culvert).

24. DES personnel met with Mr. Thistle during the September 10, 2002, inspection. At the meeting, DES personnel again stressed the importance of stabilizing the site to prevent further erosion of sediments into jurisdictional wetlands and Bee Hole Brook, and retaining a wetlands scientist to design an erosion control plan to prevent further migration of sediments downstream during subsequent rain events. At the September 10, 2002 inspection, DES personnel offered the following written recommendations:

- a. Mulch all slopes, specifically those slopes leading down to the culvert, above the culvert headwalls, along the backside of house lot 14 adjacent to Bee Hole Brook and near the start of roadway construction;
- b. Install silt fence and back with hay bales along the culvert headwalls and at the toe of slopes on the southerly side of the start of roadway construction;
- c. Install silt fence around all stockpiles, particularly those along lot 14 downstream of the culvert and adjacent to the east bank of Bee Hole Brook;
- d. Install smaller stone for the check dams along the roadside drainage swales to slow flow velocities in these swales;
- e. Contact Peter Schauer, C.W.S., immediately to prepare a restoration plan for Bee Hole Brook and to design measures to prevent further migration of sediment downstream; and
- f. Contact Ridge Mauck, DES Site Specific Program, to discuss the changes made to treatment swale #1 and level spreader #1 (located downstream of the culvert on the westerly side of Bee Hole Brook).

25. On September 11, 2002, DES personnel inspected the Property a third time and observed the following:

- a. The steep slopes on either side of the arched culvert at Bee Hole Brook, and those located behind house lot 14, were not stabilized. Mr. Thistle agreed at this time to stabilize the slopes adjacent to the culvert with jute matting and to extend silt fence along the toe of the slope behind house lot 14; and
- b. Mr. Thistle continued to work on grading the road and slopes. DES advised Mr. Thistle that stabilization of the Property was a priority and slopes should be stabilized immediately.

26. At the September 11, 2002 inspection, Mr. Thistle told DES personnel that Peter Schauer, C.W.S., had been to the site that morning and recommended the installation of 2 check dams across Bee Hole Brook to the west of the culvert to prevent further downstream migration of sediment during rain events. Mr. Thistle told DES personnel that Mr. Schauer would contact DES soon to further discuss restoration.

27. On September 13, 2002, Mr. Schauer faxed DES an emergency restoration plan (the "Restoration Plan"). The Restoration Plan proposed to "remove silt from the stream by hand with buckets, placing silt in uplands outside of the Wetlands Bureau jurisdiction. The fill slopes must be stabilized and silt fence placed at the top of the culvert and along the slopes of the fill on both sides of the road." Mr. Schauer requested that DES issue a restoration order so that work could be started and completed by the end of the day on September 14, 2002, since rain was forecasted for September 15, 2002.

28. On September 13, 2002, DES issued a restoration plan approval for the Restoration Plan.

29. On September 16, 2002, DES personnel inspected the Property for a fourth time and observed the following:

- a. Five stone check dams were constructed across Cross Brook Road. The check dams contained accumulations of sediment. Silt fence detention bays where water from the check dams was directed had failed and additional sediment had been deposited in Bee Hole Brook;
- b. Silt fence was installed behind house lot 14. In this location, three areas of silt fence had failed but sediment had not reached Bee Hole Brook in two of these locations; and
- c. DES personnel collected turbidity samples in Bee Hole Brook during the September 16, 2002 inspection. A background sample measuring 7.1 NTUs was taken 50 ft. east (upstream) of the culvert, and a second sample measuring 33 NTUs was taken 100 ft. west (downstream) of the culvert.

30. Pursuant to Chapter 41, Laws of 1951, Bee Hole Brook is classified as a Class B surface water.

31. Pursuant to Env-Ws 1703.11(b), turbidity in Class B waters shall not exceed naturally occurring conditions by more than 10 NTUs.

32. RSA 485-A:13, states that it shall be unlawful for any person or persons to discharge or dispose of any sewage or waste to the surface or groundwater of the state without first obtaining a permit from DES.

33. Sediment-laden water constitutes waste as defined under RSA 485-A.

34. On November 6, 2002, DES issued Administrative Order No. WD 02-034 to Wayne Thistle. Division personnel conducted another follow-up inspection of September 29, 1003 and observed the following:

- a. The slopes adjacent to Bee Hole Brook were fully stabilized;
- b. Slopes behind Lot 14 were stable;
- c. Riprapped swales had been constructed, but need to be cleaned out (accumulated sediment);
- d. Wetland crossing # 3 has complete and stabilized; and
- e. Accumulated sediment is gone from Bee Hole Brook.



#### IV. ALLEGATIONS AND ADMINISTRATIVE FINES

1. Mr. Thistle has violated RSA 482-A:3, I, by filling 1,362 linear feet of Bee Hole Brook with sediment ("Violation 1"). For this violation, Env-C 614.05(c) specifies a fine of \$2,000.
2. Mr. Thistle has violated RSA 482-A:14, III, by failing to comply with Condition 1 of the Wetlands Permit ("Violation 2"). This violation specifically included:
  - a. Failing to install silt fencing and other temporary erosion control measures. This is also a violation of Condition 6 of the Wetlands Permit;
  - b. Failing to construct permanent erosion, sediment, and detention facilities prior to earthmoving in the work area;
  - c. Failing to stabilize stockpiles or surround them with temporary erosion controls; and
  - d. Failing to stabilize graded slopes.

For this violation, Env-C 614.06(f) specifies a fine of \$2,000.

3. Mr. Thistle has violated RSA 482-A:14, III, by failing to comply with Condition 5 of the Wetlands Permit, that stated the Permit shall not be effective until it has been recorded with the Registry of Deeds Office by the Permittee ("Violation 3"). For this violation, Env-C 614.07(c) specifies a fine of \$500.
4. Mr. Thistle has violated RSA 482-A:14, III, by failing to comply with Condition 7 of the Wetlands Permit which required that orange construction fencing shall be placed at the limits of construction to prevent accidental encroachment on wetlands ("Violation 4"). For this violation, Env-C 614.05(l) specifies a fine of \$2,000.
5. Mr. Thistle has violated RSA 482-A:14, III, by failing to comply with Condition 15 of the Wetlands Permit which required the contractor responsible for completion of the work to utilize techniques described in the DES *Best Management Practices for Urban Stormwater Runoff Manual* (January 1996) and the *Stormwater Management and Erosion and Sediment Control Handbook for Urban and Developing Areas in New Hampshire* (August 1992) ("Violation 5"). For this violation, Env-C 614.05(l) specifies a fine of \$2,000.
6. Mr. Thistle has violated RSA 482-A:12, by failing to post the Wetlands Permit on the Property (Violation 6"). For this violation, Env-C 614.07(a) specifies a fine of \$500.
7. Mr. Thistle has violated RSA 482-A:17, and Item 1 of the Site Specific Permit, by discharging sediment laden water into surface waters of the state without a permit from DES ("Violation 7"). For this violation, Env-C 603.02(a)(2) specifies a fine of \$2,000.

8. Mr. Thistle has violated RSA 485-A:17, and Item 2 of the Site Specific Permit, by failing to comply with the construction details and sequences approved in the Plans ("Violation 8"). For this violation, Env-C 603.02(a)(2) specifies a fine of \$2,000.

9. Mr. Thistle has violated RSA 482:A:6 by failing to comply with Administrative Order Number WD 02-34 ("Violation 9"). For this violation, Env-C 614.06(e) specifies a fine of \$2,000.

#### **V. , PAYMENT, WAIVER OF HEARING**

1. In order to avoid the time and cost associated with litigating the allegations described above, DES agrees to accept the fines listed below:

- a. \$2,000 for Violation 1;
- b. \$500 for Violation 3;
- c. \$2,000 for Violation 5;
- e. \$1,000 for Violation 8;
- f. \$2,000 for Violation 9;

2. DES agrees to waive the fines associated with Violations 2, 4, 6, and 7, thereby reducing the total \$15,000 penalty by \$7,500 (50%), based on Mr. Thistle having no history of non-compliance with hazardous waste requirements (20%), his level of cooperation (15%), and his good faith efforts to comply with applicable environmental laws (15%).

3. Mr. Thistle agrees to pay of the remaining fine of \$7,500 upon execution of this Agreement. Full payment shall satisfy Mr. Thistle's liability for all administrative fines which could have been imposed by DES for violations alleged herein.

4. Payment under Paragraph V.3 shall be made payable to: "Treasurer, State of New Hampshire" and mailed to:

DES Legal Unit  
Attn: Michael Sclafani, Legal Assistant  
PO Box 95  
Concord, NH 03302-0095

12. If any payment is made by check or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the check or money order to \$25, whichever is greater, plus all protest and bank fees, in addition to the amount of the check or money order, to cover the costs of collection.

13. The effective date of this Administrative Fine by Consent will be the date on which it is signed by Mr. Thistle, the Director of the Water Division, and the Commissioner of DES.

14. By executing this Administrative Fine by Consent, Mr. Thistle waives his right to a hearing or on any appeal of the administrative fines identified in Section V, Paragraphs 1 through 16 and agrees that this Administrative Fine by Consent may be entered into and enforced by a court of competent jurisdiction.


15. The effective date of this Administrative Fine by Consent will be the date on which it is signed by Wayne Thistle, the Director of the Water Division, and the Commissioner of DES.

16. No failure by DES to enforce any provision of this Administrative Fine by Consent after any breach or default will be deemed as a waiver of its rights with regard to that breach or default, nor will such failures be construed as a waiver of the right to enforce each and all provisions of this agreement on any further breach or default.

**COPY**  
  
Wayne Thistle

Date 12/10/03

Department of Environmental Services

**COPY**  
  
Harry T. Stewart, Director  
Water Division

Date 12/11/03

**COPY**  
  
Michael P. Nolin, Commissioner

Date 12/12/03

cc: Gretchen Rule, Administrator, DES Legal Unit  
Public Information Officer, DES PIP Office  
Jennifer Patterson, Sr. Asst. Attorney General, EPB, N.H. Dept. of Justice